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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1280

DAMCO TESTERS, INC. and D. A. MILLER,
Appellant-Petitioners

v.

SUPERIOR TESTERS, INC., *Appellee-Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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This case comes before this Court on a Petition by Damco Testers, Inc. ("Damco") and D. A. Miller ("Miller"), Defendants below, for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit which affirmed *per curiam* the judgment of the United States District Court for the Eastern District of Louisiana, New Orleans Division (per Judge Alvin D. Rubin).

Respondent Superior Testers, Inc. ("Superior") wishes to emphasize at the outset the fact that the three judges sitting for the Fifth Circuit in this case did not consider the instant circumstances sufficiently special or important to warrant a written opinion. After careful review of the detailed opinions of the trial court, stated both in writing and orally in open court, the Fifth Circuit affirmed *per curiam*. The instant Petition is nothing more than an attempt to reargue matters which are clearly within the sound discretion of the trial court. The failure of the petitioners to present their points with accuracy, brevity, and clearness demonstrates the absence of any special or important reason for allocating the valuable time and energies of this Court to this case. Supreme Court Rule 23.4

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals for the Fifth Circuit is reported at 468 F.2d 629. The several written opinions of the District Court are reported at 309 F. Supp. 661, 315 F. Supp. 934, 336 F. Supp. 37, and 172 U.S.P.Q. 51.

RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS PRESENTED BY PETITIONER FOR REVIEW

(1) Does a trial court abuse its discretion by refusing Defendants' attempt, a full year after their liability has been tried and determined, to retry liability on the basis of a defense which was originally abandoned by pleadings, stipulations, and pre-trial order?

(2) Does a trial court abuse its discretion under the provisions of 35 U.S.C. § 284 if it awards damages for infringement of exclusive territorial patent rights which are not limited to a reasonable royalty?

STATEMENT OF THE CASE

Since it is very difficult to distinguish the material from the immaterial in Defendants' Petition, we here restate the material facts relevant to the questions presented to this Court.

I.

Inception and Growth of Plaintiff Superior

This is an ordinary case of a licensee enforcing its exclusive territorial rights against the owner of certain United States patents. The patented equipment is an internal high pressure pipe testing device designed by Brown Oil Tools, Inc. ("Brown") for oil well operations.[1] To internally test pipe, a pair of tools is used to seal off a segment of pipe as it is going into the well and that segment is then subjected to controlled hydraulic pressure to determine possible leaks.

Prior to February 1, 1966, Brown, as one facet of its business, tested pipe with its patented equipment throughout the Southwest, including the States of Louisiana and Mississippi and off-shore coastal areas. (App. 1725) In late January 1966, Defendant Miller and Lee J. Matherne ("Matherne") organized and incorporated Plaintiff Superior under the Laws of Louisiana (App. 1730, Articles of Incorporation, PX 1) and purchased the pipe testing business of Brown in the Louisiana-Mississippi territory. (Bill of Sale, PX 4, copy appearing at App. 43-4) In connection with the purchase, Superior agreed to pay Brown "a royalty of 1½% of the amount Superior receives from the testing of pipe which is covered by"

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[1] The patents involved are U. S. Patents Nos. 2,621,675; 2,633,739 and 2,953,919. These three patents are collectively referred to as the "Brown Patents".

the Brown Patents, and Brown got out of the pipe testing business altogether in the States of Louisiana and Mississippi and off-shore coastal areas.

For approximately three years (1966-1968), Plaintiff Superior operated within the States of Louisiana and Mississippi and off-shore coastal areas as the exclusive operator of the patented Brown equipment. (App. 1757) The patented Brown equipment was the best pipe testing equipment available (App. 3211), and the business of Plaintiff Superior flourished. By 1968 Superior enjoyed 75-90% of all pipe testing business in the Louisiana-Mississippi and off-shore coastal territory (App. 3214, 3365; Webster Dep. p. 23). During the three year period, Superior paid Brown royalties in excess of $30,000. (App. 1821) As of January 31, 1969, a fair market value for Superior as a going business was approximately $485,000. (App. 3018).

II.

Inception of Defendant Damco and Purchase of the Brown Patents

In 1968, the relationship between Matherne and Miller at Plaintiff Superior became strained and deteriorated to the point where in December communications between the two completely broke down. After Miller was unsuccessful in raising sufficient capital to buy out Matherne, Miller opted to organize a pipe testing business of his own. On December 27, 1968, Miller, together with certain other local individuals, incorporated Defendant Damco. (App. 1783; Damco Articles of Incorporation, PX 11) The other individuals who joined Miller included the office manager of Plaintiff Superior (Claudia Deal) and the accountant employed by Plaintiff Superior (Frank J. Lofaso). (App. 1832-4).

Within a few days after incorporation, Defendant Damco opened an office approximately one mile from Superior's principal office in Houma, Louisiana (App. 1788), and proceeded to hire as its shop foreman, machinist and various other employees, those individuals who, until approximately that time, had been employed by Plaintiff Superior. Further, Damco bought supplies from substantially the same suppliers that Plaintiff Superior used, began to solicit business from Superior's customers (App. 1837) and copied Superior's forms and method of operation. (App. 1841-3)

But, most importantly, Defendants Damco and Miller set out immediately to build equipment that was identical to Superior's equipment including the identical patented Brown testing tools. (App. 1791, 1794, 2808-9). In fact, Miller admitted that when he organized Damco, his intention was to copy the patented Brown tools (App. 2810-1) even though he knew (a) that he had no rights under the Brown Patents (App. 2815-6) and (b) that Superior had an exclusive license in the Louisiana-Mississippi territory (App. 2819-20).

Recognizing that he had no rights to the patented Brown tools, Miller sought to enhance his position by purchasing the Brown Patents. On February 25, 1969, Defendant Damco purchased the Brown Patents for $75,000 cash. (Agreement, PX 10, copy appearing at App. 52-9). However, the Agreement specifically provided that the purchase was subject to the exclusive license of Plaintiff Superior for the Louisiana-Mississippi territory.

After purchase of the Brown Patents, Damco advised Superior that all future royalties should be paid directly to Damco. (Letter, PX 22, copy appearing at

App. 60). By 1971, Superior had paid royalties to Damco in excess of $10,000. (App. 1820-1). Furthermore, on March 1, 1969, Damco entered into a license agreement (PX 77) with one Tom Hansen which provided for Hansen to pay royalties to Damco under the Brown Patents in connection with Hansen's use of the same Brown tools in West Texas. Defendant Damco has never repudiated its right to royalties from Superior or Hansen even though it now argues that the Brown patents do not cover the Brown tools used by both Superior and Hansen.

III.

Fall of Plaintiff Superior

The entry of Damco into the market with its infringing pipe testing tools eliminated Superior's exclusive use of the patented Brown equipment in the Louisiana-Mississippi territory and destroyed Superior's dominant position. As a result, Superior's fortunes experienced a dramatic reversal. While Superior averaged a gross monthly income during 1967 and 1968 in excess of $75,000 (Chart, PDHX 5), its gross monthly income dropped rapidly once Damco actually entered the market in April 1969. By the end of 1969, Superior's gross business had dropped to approximately $23,000 per month, or less than one-third (⅓) its average during the 1967-68 period.

Superior's financial organization had been set up on the basis of the revenues experienced in the 1967-68 period and high revenues were necessary to service the debt and overhead requirements of the company. (App. 2142-8). When gross revenues dropped drastically during 1969 and early 1970, Superior could no longer function financially. (App. 2142-8, 3025; PDHX 5).

Superior experienced a net loss of $216,380 in 1969 (App. 3120; PDHX 6), whereas in the two previous years it had averaged a net income of $83,273. As a result, on January 31, 1970, Superior had a *deficit* net worth of about $85,000 (App. 3121), and when shortly thereafter Superior discontinued testing operations in April 1970, it was from a financial standpoint worthless.

IV.

Defendants Damco and Miller Admitted Infringement from the Outset and the Entire Course of the Lawsuit Progressed on That Basis

The Complaint and Amended Complaint in this case charged Defendants in separate counts with: (a) infringement of Plaintiff Superior's exclusive territorial patent rights (Count I); (b) violation of Plaintiff Superior's exclusive license rights (Count II); and (c) unfair competition (Count III). Immediately after filing its Complaint but prior to Defendants' Answer, Plaintiff Superior embarked upon discovery by deposing various individuals, including Defendant Miller. On May 5, 1969, when Plaintiff's attorney began questioning Mr. Miller about the pipe testing tools used by Damco, the questioning was interrupted by patent counsel for Defendants Damco and Miller. Defendants' patent counsel agreed to stipulate in order to shorten the examination that equipment made and used by Damco was covered by the Brown Patents and was identical to the tools used by Superior. (Miller Dep. pp. 24-26, 34).

Subsequently, the Answer filed by Defendants Damco and Miller admitted the validity of the Brown Patents (Answer, ¶ 8; App. 106) and admitted that the pipe

testing equipment "manufactured by Defendant Damco is covered by the [Brown] patents." (Answer, ¶ 14, App. 112) Moreover, Defendant Damco filed a Counterclaim against Plaintiff Superior charging that Superior's manufacture and use of the Brown tools was an infringement of the Brown Patents, then owned by Damco, because Superior had allegedly breached its exclusive license agreement. (Answer, ¶ 68; App. 133). Extensive discovery was conducted by all parties based upon the issues as narrowed by the stipulations and Answer. This discovery included the oral deposition of some twenty-eight (28) witnesses as well as numerous sets of interrogatories. On September 24, 1969, the parties entered into a Pre-Trial Order which also contained the admission that the testing tools made and used by Damco were covered by the Brown Patents. (Pre-Trial Order, § 7(b) ¶¶ 10 and 11; App. 201).

At the trial to determine liability, Mr. Torres, patent counsel for Defendants Damco and Miller, as well as counsel for Brown who was then a defendant, stipulated that the pipe testing tools manufactured and used by Damco and Miller were covered by the Brown Patents. (App. 1794-7). The principal defenses urged by Defendants Damco and Miller were (a) Plaintiff Superior had merely a non-exclusive license under the Brown Patents and (b) Superior's license rights covered only inland territory. The District Court rejected both defenses and concluded that Superior had the exclusive right to use the patented Brown tools in Louisiana and Mississippi and off-shore coastal territories. Thereupon, on December 18, 1969, Damco and Miller were enjoined from further infringement in Superior's exclusive territory. (Order, December 18, 1969, App. 238-9; as modified by Order, January 21, 1971, App. 382-3).

Approximately one full year after Defendant Damco had lost on the liability issue and been enjoined from further infringement, and on the eve of the trial to determine Defendants' contempt of the injunction Order, Defendants (on December 4, 1970) filed a Motion to withdraw their stipulation with respect to patent coverage and to amend their pleadings to urge the issue of non-infringement as a new theory of defense. (App. 350) After careful consideration, Judge Rubin denied the Motion "but without prejudice to Defendants to raise the issue of validity or infringement of U. S. Patent No. 2,953,919 [2] in any other appropriate proceeding." (Order, Feb. 18, 1971, ¶ 5, App. 386).

After the contempt hearing (December 7-9, 1970) Judge Rubin found Defendants Damco and Miller in willful and deliberate contempt and violation of his original injunction Order for their continued use of the patented Brown tools in Superior's exclusive Louisiana-Mississippi territory. As admitted by one of the Damco operators, the patented Brown tool was the only one which could perform on certain jobs (App. 2708) and the only alternative to the contemptuous acts was to shut down the operation and not complete the job. (App. 2718). Judge Rubin allowed $28,149.42 of the $45,383.42 sought by Plaintiff Superior in connection with the contempt.

Following the trial on damages (July 6-9, 1971), Judge Rubin awarded Plaintiff Superior an additional $150,000.00 compensatory damages.

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[2] By this time in the proceedings, the other two Brown patents in suit had expired.

ARGUMENT

I.

There Is No Special or Important Reason for the Supreme Court To Grant Certiorari in This Case

Early decisions of this Court indicate the very limited circumstances in which certiorari should be granted. In *American Construction Co.* v. *Jacksonville, T. & K.W.R. Co.,* 148 U.S. 371, 37 L.Ed. 486 (1893) the Court denied certiorari and stated:

> [The granting of certiorari] should be granted sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.

In a patent case, *Layne and Bowler Corp.* v. *Western Well Works,* 261 U.S. 387, 68 L.Ed. 712 (1923), the Court explained the standard for granting a writ of certiorari in the following language:

> [It] is important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from the parties, and in cases where there is real and embarrassing conflict of opinion between the circuit courts of appeal. 261 U.S. at 393

This very limited review should be even more strictly followed today in view of the numerous paramount public issues which need consideration by this Court.

There is absolutely no principle of importance to the public involved in this case nor any conflict of opinion between the circuit courts which should predicate the granting of certiorari. This is an ordinary case of an exclusive licensee suing to prevent violation by the patent owner of his exclusive territory. Since

petitioners have failed to delineate any special or important reason why this Court should review the circumstances of this case, the petition should be denied.

II.

The Trial Court Has Discretion To Deny An Untimely Attempt To Reassert a Defense Originally Abandoned by Pleadings, Stipulations, and Pre-Trial Order

Petitioners characterize their failure to assert the defense of non-infringement in this case only as "a stipulation entered into erroneously or inadvertently in the course of litigation". (Petition, p. 3) This characterization is inaccurate since this is not a case of a naked stipulation by counsel. Aside from the original stipulation by Defendants' patent counsel at the outset of this case, the infringement was admitted in the Answer filed by Defendants and was the basis on which Defendant Damco asserted (in its Counterclaim) that Plaintiff Superior was infringing the Brown Patents. Furthermore, the Pre-Trial Order, § 7(b), ¶¶ 10-11 (App. 201), contains a clear statement that the testing tools made and used by Damco are covered by the Brown Patents. Accordingly, this is not a case of inadvertent stipulation, erroneously entered into, but rather a statement of position upon which the entire course of the litigation proceeded.

Moreover, the admission was intentional and calculated from the outset. The Complaint and Amended Complaint placed in issue not only the scope and character of Superior's license but also the validity and infringement of the Brown Patents. These patents had just been acquired by Damco for $75,000 cash which Damco had borrowed from a local bank. Plaintiff Superior was obligated to pay Damco substantial roy-

alties and Tom Hansen had just signed a license agreement with similar obligations. An immediate attack by Dameo on the validity and/or infringement of the Brown Patents would have jeopardized payment of the royalties, which money Dameo dearly needed to fund its early operations, and would have caused concern at the bank. Accordingly, Defendants Dameo and Miller elected to defend this action without attacking the validity or infringement of the Brown Patents. Furthermore, Dameo and Miller realized that a successful attack on Superior's license, while leaving the validity and infringement of the Brown Patents intact, would put Dameo in a dominant patent position with only a non-exclusive or otherwise limited license to Plaintiff Superior.

This Court recently reaffirmed the long-standing principle that refusal to permit amendment of pleadings is within the sound discretion of the trial court. *Zenith Radio Corp.* v. *Hazeltine Research,* 401 U.S. 321, 330-332, 20 L.Ed. 2d 77, 87-88 (1971). There should be no need to further enunciate this principle in this case. The early *Carnegie Steel* decision [3] quoted by petitioners (Petition, p. 25) is not inapposite. The Court there stated that a party may repudiate an inadvertent fact incorporated in a stipulation only if, and we emphasize if, sufficient notice is given to the opposing party *to prevent prejudice.*

In denying Defendants' request to amend their pleadings, withdraw their stipulations and relitigate the question of liability on the basis of a new theory of defense, the trial court advanced three reasons. First, Judge Rubin reasoned that Defendants' Motion

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[3] *Carnegie Steel Co.* v. *Cambria Iron Co.*, 185 U.S. 403, 46 L.Ed. 968 (1902).

was untimely because Defendants had ample time to raise the defense of non-infringement before the trial on the liability issue. When Defendants first sought to assert their new defense, the case had been pending for eighteen months and the question of liability had been tried and an injunction in force for almost one year.

Second, Judge Rubin recognized the prejudice to Plaintiff Superior should the case be reopened and liability relitigated. Realizing that each party to the suit had already expended over $70,000 in litigation expenses and attorneys' fees, Judge Rubin declared:

> It would be unjust to Superior to reopen the almost completed and already distressingly expensive and protracted matter to inject into it all the issues involved whenever patent validity is contested and to delay its determination for the time required for such litigation. (Supp. App. 10)

Third, Judge Rubin reasoned that Defendants were not prejudiced because he had preserved their right to litigate, in separate proceedings, the issues raised in the proposed amended pleadings. In other words, in denying Defendants' Motion to reopen and relitigate, Judge Rubin stated unequivocally that the denial was "without prejudice to Defendants to raise the issue of validity or infringement of U.S. Patent No. 2,953,919 in any other appropriate proceedings." (Order, February 18, 1971, ¶ 5, App. 386). In fact, such a lawsuit is now pending. In 1971, Defendants filed a declaratory judgment suit in which the infringement and validity of the Brown Patents have been raised.[4]

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[4] *Damco Testers, Inc.* v. *Superior Testers, Inc.*, Civil Action No. 71-1799, pending in the United States District Court for Eastern District of Louisiana, New Orleans Division.

Petitioners' argument that this case is in conflict with the prior decisions of this Court in *Lear* v. *Adkins*, 395 U.S. 653, 23 L.Ed. 2d 610 (1969); *Blonder-Tongue Lab., Inc.*, v. *University of Illinois Found*, 402 U.S. 313, 28 L.Ed. 2d 788 (1971); *Carbice Corporation* v. *American Patent Development Corp.*, 283 U.S. 27, 75 L.Ed. 819 (1931); *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U.S. 661, 88 L.Ed. 376 (1944); and *Scott Paper Co.* v. *Marcalus Mfg. Co.*, 326 U.S. 249, 90 L.Ed. 47 (1945), is just foolishness.

First, we hasten to point out that petitioners hopelessly misconstrue this Court's decision in the *Blonder-Tongue* case since that decision *established* the res judicata principle in dealing with patent validity.

Second, insofar as each of the prior cases deals with the public policy inherent in patent controversies, emphasis was placed on the public interest in patent validity, as opposed to infringement. Defendants' complaint here does not deal with the issue of patent validity, but rather with the issue of patent infringement.

Third, and most important, the trial court preserved petitioners' right to attack the validity and infringement of the Brown Patents in all respects. Defendants have acknowledged this right by initiating a declaratory judgment action in which the issues of infringement and validity of the Brown Patents have been raised. Accordingly, no good purpose would be served by this Court reviewing issues which have already been preserved to Defendants by the trial court and which Defendants are already litigating in a different lawsuit.

III.

The Trial Court Properly Exercised Its Discretion in Awarding Plaintiff Superior $150,000 Damages in This Case

The Petition to this Court in connection with the $150,000 damages award is nothing more than a re-argument of the factual determinations made by the trial court after a detailed review of the Master's Report, examination of demonstrative accounting exhibits and four days of testimony. Petitioners rely on an alleged conflict with Section 284 of the Patent Statutes (Title 35) which provides in part:

> Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement *but in no event less than a reasonable royalty* for the use made of the invention by the infringer, together with interest and costs as fixed by the court. (Emphasis added)

But, nothing should be more evident than that § 284 provides for a reasonable royalty as the *minimum* measure of damages which can be awarded by the court. See *Zysset* v. *Popeil Brothers, Inc.,* 318 F.2d 701, 706 (7th Cir. 1963), cert. denied 376 U.S. 913 (1963).

The trial court in this case applied three accepted methods for determining the proper quantum of damages and a fourth measure as a "cross-test". (App. 3361) The three methods were (1) loss in value of Superior as a going business, (2) Superior's lost profits and (3) Damco's realized profits. The cross-test was reasonable royalty. (Opinion, November 10, 1971, Supp. App. 5-6). What Defendants fail to deal with in their Petition is that Judge Rubin, in arriving at the amount of damages to assess, rejected the contentions of both Plaintiff and Defendants and specifically concluded that only one-half of the total dam-

ages suffered by Plaintiff Superior should be attributed to Defendants' infringement; the other half was attributable to other factors. (Oral Opinion, App. 3358-61; written Opinion, November 10, 1971, Supp. App. 4). Accordingly, in computing and arriving at the damages, Judge Rubin assessed only one-half of Superior's total damages as the measure of the damages resulting from Defendants' infringement. The fifty percent allocation was clearly supported by the record and there is no basis to conclude that it was somehow unreasonable.

The obvious fallacy in the figures presented by petitioners is that they have been presented out of context. By selecting only certain figures, petitioners present a distorted analysis of the overall evidence presented at the trial on the question of damages. The attempt to discredit the damages awarded by comparing the gross sales of Superior in 1968 with the combined gross sales of Superior and Damco in 1969 and then asserting that the difference was the result of other competitors (Petition, pp. 47-48) is a case in point. What the Petition fails to point out is that the competitors were also in business in 1968 when Superior had reached a dominant position in the industry, performing approximately 75-90% of all pipe testing business in its exclusive territory. The decline in the combined business of Damco and Superior in 1969 was not the result of competition from others, but rather the "internecine warfare" between Damco and Superior (per Judge Rubin, App. 3365-3367) which was precipitated by Damco's copying of the Brown tools.

Since the trial court acted fully within its discretion under the statute in allocating fifty percent of Superior's total damage to Defendants' use of the pat-

ented Brown tools in Superior's exclusive territory, there is no reason why this Court should review such determination.

CONCLUSION

From the foregoing, it should be apparent that no special or important reason exists for this Court to review the decisions of the lower courts in this case. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully,

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Certificate of Service

I certify that two copies of the foregoing brief has been mailed to Nathan Greenberg, attorney for Appellant-Petitioners at his office, postage prepaid.